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No. 86-1102

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MANUFACTURERS ASSOCIATION OF TRI-COUNTY, et. al.,

Petitioners

v.

JAMES W. KNEPPER, JR., et al.,

Respondents

ON CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

ARGUMENT 3

The Third Circuit's Preemption Analysis Is An Extraordinary Departure from Established Precedent 4

Petitioners Merely Seek Recognition of the Limits That Were Intended by Congress to Be Applied to States' Actions 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Pages

New Jersey Chamber of Commerce v. Hughey,
774 F. 2d 587 (3d Cir. 1985) 4

United Steelworkers of America v. Auchter,
763 F. 2d 728 (3d Cir. 1985) 4

Statutes and Regulations

Occupational Safety and Health Act of 1970,
29 U.S.C. §§651 et seq. 3, 4, 5, 6

29 U.S.C. §667 (b) 5

Employees Retirement Income Security Act of 1974,
29 U.S.C. §§1001 et seq. 5

Pennsylvania Worker and Community Right-to-Know Act,
35 PA. STAT. ANN. §§7301 et seq. (Purdon Supp. 1986) . 3

OSHA Hazard Communication Standard,
29 C.F.R. §§1910.1200 et seq. 3, 6

Other Authorities

48 Fed. Reg. 53329 (1983) 5

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ARGUMENT

Respondents have failed to present any substantial reason why the Petition should not be granted. Their Brief in Opposition inaccurately describes the preemption test applied by the Third Circuit below, mischaracterizes the Pennsylvania Worker and Community Right-to-Know Act (the "Right-to-Know Act"),[1] and, while raising the specious specter of danger to state interests, ignores the real issue of the relationship of the state statute to the OSHA Hazard Communication Standard.[2]

Indeed their Brief unintentionally demonstrates why this Court should take this opportunity to address the vital issue of extent to which the Occupational Safety and Health Act of 1970[3] ("the OSH Act") preempts state hazard communication laws.

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[1] 35 PA. STAT. ANN. §§7301 et seq. (Purdon supp. 1986).

[2] 29 C.F.R. §§1910.1200 et seq.

[3] 29 U.S.C §§651 et seq.

The Third Circuit's Preemption Analysis Is An Extraordinary Departure from Established Precedent

Respondents' position highlights the conflict between the Third Circuit's decision below and the intent of the OSH Act,[4] as well as other decisions of this Court emphasizing the inappropriateness of relying on purported state purposes. Their brief wrongly creates the impression that the case involves only a conflict between the federal government's treatment of "worker protections" and the state's interest in protection of the "public at large", Brief in Opposition at 2-3, whereas the real problem arises because of state statutory provisions purportedly aimed at both goals.

Respondents admit that this Court has expressed its disapproval of treating a state purpose as "dispositive in preemption analysis." Brief in Opposition at 8. The Third Circuit abandoned traditional preemption analysis, which would have concentrated on the scope of the OSH Act, and made dispositive its interpretation of Pennsylvania's purpose. Even Respondents appear to recognize the real basis of the court of appeals' decision when they state that it "refus[ed] to strike down, on preemption grounds, those requirements of the Pennsylvania Act calculated to promote public health and safety." Brief in Opposition at 4. The court made no attempt to determine whether the provisions of the

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4 Respondents' appeal to the general proposition that state regulations are presumed to be valid unless shown to be contrary to the clear and manifest purpose of Congress has no relevance, since the Third Circuit had previously found that Congress did expressly intend that the OSH Act preempt state laws relating to the same subject. United Steelworkers of America v. Auchter, 763 F. 2d 728, 736 (3d Cir. 1985). This was later reaffirmed by the same court: "As we held in Steelworkers, section 18 of the OSH Act expressly preempts state law pertaining to issues that are addressed by OSHA standards unless a state plan has been approved by the Secretary." New Jersey Chamber of Commerce v. Hughey, 774 F. 2d 587, 592 (3d Cir. 1985).

Right-to-Know Act relate to anything covered by the OSHA Hazard Communication Standard.[5]

Respondents attempt to distinguish the express preemption analysis approved by this Court in cases involving the Employees Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et seq. (1982) ("ERISA"), on the basis that those cases interpret a more sweeping preemption provision than that found in the OSH Act. Brief in Opposition at 7, 8. The key phrase in the two statutes is identical, however. ERISA states that it shall "supersede" any state laws that "relate to" any employee benefit plan. The OSH Act provides that OSHA must approve any state law "relating to" an occupational safety and health issue for which a federal standard is in effect. 29 U.S.C. §667 (b). Thus both statutes present the same question of the plain meaning of "relating to", and the ERISA cases interpreting the phrase are right on point.

No amount of effort by Respondents can place the decision by the court below within reasonable bounds of express preemption analysis as laid down by this Court. Therefore they would, as the Third Circuit did, create a new test to enable state hazard communication laws to be routinely upheld.

Petitioners Merely Seek Recognition of the Limits That Were Intended by Congress to Be Applied to States' Actions

Respondents claim that Petitioners desire to "oust" the states from exercising control over "grave threats" to public health that may "incidentally" affect workers. Brief in

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5 The Third Circuit completely failed to address the agency's stated purposes for promulgation of its Hazard Communication Standard. Respondents make the preposterous claim that the decision below actually comports with agency intent, Brief in Opposition at 7, in spite of the fact that OSHA specifically referred to state labeling and fact sheet requirements as burdens to OSHA's efforts to establish a comprehensive national standard. 48 Fed. Reg. 53329 (1983).

Opposition at 4, 5. They further fantasize that states will be unable to exercise their traditional police powers to protect public health, resulting in a "public health gap". Brief in Opposition at 7. Although Respondents' statements do highlight the importance of the issue before this Court, they misstate both Petitioners' position and the results of proper preemption analysis.

The Right-to-Know Act has far more than an "incidental" effect on workers claimed by Respondents as can be seen by the most cursory reading of the act. Indeed, most of the state statute's provisions relate in some manner to employee protection. Respondents' claim also directly contradicts findings by the District Court. Pet. App. C-4. Thus the "public health gap" is purely illusory, since the state has not attempted to enact a statute unrelated to issues under the jurisdiction of OSHA.

Petitioners, of course, agree that the protection of public health should generally remain within the states' police powers. The states can regulate in areas where OSHA has not. In fact, the states may even act in an area covered by an OSHA Standard if they first obtain the approval of OSHA. Congress clearly wanted to "oust" the states from exercising some of their police powers when it enacted the OSH Act, by prohibiting, without prior approval, all state legislation relating to the issues covered by an OSHA Standard. What the Third Circuit failed to do, and what preemption analysis requires, is to determine the extent to which the provisions of the Right-to-Know Act relate to the issues covered by the OSHA Hazard Communication Standard. If they do relate to such issues, they are preempted no matter what "public health" purposes may be imputed to them.

Conclusion

Respondents' emphasis on the concerns of the states really underscores the importance of this case to the federal-state system. It is apparent that the struggle over the proper

limits on state right-to-know laws has caused a large number of states and a wide spectrum of industry to look for a decision by this Court on the proper preemption analysis. The Writ should be issued.

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